IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 215 OF 2000

Ramchandra Laxman Waghmare,
Convict Prisoner,No.-11117
Yervada Central Prison,
Pune -411006. .. Appellant
(Orig.accused)

V/s

The State of Maharashtra. ..Accused.

Mrs. Prajakta P. Shinde, Advocate appointed for the appellant.

Mrs. U.V. Kejriwal, A.P.P. for the State.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.

DATE : 22ND SEPTEMBER, 2004.

ORAL JUDGMENT (**PER ANOOP V. MOHTA J.**)

. The appellant accused has been convicted for killing his wife and therefore, the Sessions Judge, Raigad, Alibaug, has imposed sentence to suffer rigorous imprisonment for life and fine of Rs. 5000/-, failing which to suffer further rigorous imprisonment for three months. Therefore, this appeal against conviction.

2. Heard Mrs. Shinde, Advocate appointed for the appellant, and Mrs. Kejriwal, A.P.P. for the State.

After appreciating, the submissions, as raised by the appellant and as opposed by the A.P.P., we have gone through the record and testimony and we are of the view that there is merit in the appeal. The conviction based on circumstantial evidence, raised various doubts and according to us, the prosecution has failed to prove the case beyond reasonable doubt and therefore, we are setting aside the order of conviction and acquitting the accused by giving him benefit of doubt.

3. The learned Additional Sessions Judge,has held that that on 9/7/1998 at about 1 a.m. Janabai, wife of the accused met with homicidal death in her house, as the appellant accused had committed murder of Janabai in their own house.

4. There is ample material on the record to show that the death was homicidal. This includes inquest panchanama, post-mortem report (Exh.13), the testimony of the Medical Officer, P.W. 6 and injuries on the body which resulted the death in question.

5. However, the basic question is the involvement

and assault in question. There was no eye witnesses in this matter. The conviction is based on the circumstantial evidence. P.W. 1, Namdeo, son of accused, was declared partly hostile, P.w. 2, Sunil, he was also declared hostile, P.W. 3, Prema Anand was also declared hostile. All these three witnesses no where able to support the prosecution case, in regard to the alleged assault by the appellant on deceased Janabai, their mother. This witness therefore, declared hostile. After going through the tenure of their cross-examination by the prosecution we found nothing, which could be extracted to support the prosecution case. Merely because there was some quarrel between the accused and Janabai, that itself cannot be the reason to accept the case of the prosecution which they sought to be proved with these three witnesses. These three witnesses are definitely interested witnesses, being son and daughters of the appellant and the deceased.

6. They were definitely in dilemma, to support or not to support the case against the accused-father and this must be troubling them from all angles. Their

mental condition in such circumstances need to be seen. But at the same stroke, if prosecution unable to place on the record other corroborative evidence, it is difficult to convict any person based, only on the testimony of such hostile or interested witnesses. No other witnesses have supported or corroborated the prosecution case so far as to the involvement of the appellant.

7. Apex Court has laid down in (Setpaul Vs. Delni Administration), reported in A.I.R. 1976 S.C. 294, that;

> "From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot, as a matter of law, be treated as washes off the record altogether. It is for the Judge, of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution and care, accept in the light of the other evidence on the record, that part of his testimony, which he finds to be credit of worthy and act upon it. If in a given case, the whole

> of the testimony of the witness is impugned, and in the process the witness stands squarely and totally discredited, the Judge, should, as matter of prudence, discard his evidence in toto."

8. The Apex Court’s another decision is Khulji alias Surendra Tiwari Vs. State of Madhya Pradesh, reported in A.I.R. 1991, S.C. 1853. This Judgment has laid down the principle that the evidence of the hostile witnesses cannot be discarded altogether and in given case, all these evidence, which is otherwise acceptable can be acted upon and relied. This jdugment itself further provides that it is for the Judge to consider in each case, the merit of such testimony. It has total or partial effect read with the other corroborated and connected evidence or not. Therefore, unless testimony of these witnesses are duly supported and corroborated by any other evidence, it is difficult to convict a person, based on such testimony of the hostile witnesses.

9. The effect of testimony of these hostile witnesses has to be seen from another angle. The contradiction and inconsistency in testimony, whatever may be the circumstances, if encountered with own

statement, affects the merit of their own statement or testimony. Such testimony, therefore, dies their own death because of self contradiction and/or inconsistencies. Such testimony of hostile witnesses therefore, definitely affect the prosecution case. The prosecution if required to cross-examine their own witnesses, cannot take support of such witness to prove their case in absence of any other, independent or corroborating and or substantial evidence.

10. The quality of the witness is important and not quantity. Therefore, in absence of any eye witness, in the present case, it raises doubt about the prosecution case as sought to be presented. The consequences is, if the prosecution was based on these basic witnesses and if they turned hostile, the built up case of the prosecution got to be uprooted.

11. Taking note of the above principle we further found that P.W. 5, Sukhdeo Satankar, was also declared hostile. This was panch witness to the arrest of the accused and seizure of his clothes. In the present case the incident was of dated 8/7/1998. The accused was

arrested on 31/8/1998, his clothes were seized on 31/8/1998, under the panhanama. The prosecution case was that accused was absconding,therefore, he could not be arrested earlier. The arrest of the accused and the seizure of his clothes after more than two months from the date ofthe incident. The said unproved panchanama by P.W. 5.All these circumstances are difficult to link the circumstantial evidence against the accused. There is an evidence on the record where witness deposed that the appellant used to go for the work for months. This was being Genash festival he returned on this particular date, and was arrested. Another mislink to the circumstantial evidence is the fact that the article or the weapon in question was recovered, as alleged, at the instance of accused, from the Jungle, on 4/9/1998, Exh.36. The statement of the accused was recorded on 4/9/1998 Exh.35. The date of incident was 8/7/1998.

11A. The only panch witness who remained now to support the case of prosecution is P.W. 4, Police Patil. He only supported the incident, that on 8/7/1998 Namdeo P.W. 1, the son of the accused came to his place, and disclosed that his mother was knifed to death

by the accused. This Police Patil along with police officer Jadhav, P.W.7, visited the spot. The inquest panchanam and spot panchanmaa were accordingly recorded.The dead body of the deceased was sent for the post-mortem. Namdeo, P.W. 1 himself was declared hostile. Admittedly, there was no eye witness to the incident. Therefore, there is nothing on the record which corroborate that the accused was involved or assaulted his wife Janabai. This witness therefore, also unable to support the prosecution case, or sufficient enough to convict and or to maintain the order of conviction as imposed.

12. P.S.I., P.W. 7, has supported the prosecution being Investigating Officer. He also deposed that the accused was traced on 31/8/1998 in Jungle. His blood stained shirt and Chaddi was attached vide Exh.34 on 4/9/1998 and accused voluntarily produced the hidden knife, which was recovered vide Exh. 35. As referred earlier this witness also failed to support the prosecution case beyond reasonable doubt.

13. This lacuna and delay in collecting or of

recovery of the necessary evidence and material to support the prosecution affected the prosecution case. It raises various doubts. Such evidence cannot be said to be reliable evidence to convict person under section 302 of I.P.C. or such other offence. According to us, the prosecution failed to prove their case beyond reasonable doubt and therefore, the conviction as imposed is unsustainable.

14. In view of this, the appeal is allowed, the judgment and order dated 26/12/1999 passed by Sessions Judge, Raigad-Alibag in Sessions Case No.164/1998 is quashed and set aside. The appellant is acquitted, he be released immediately, unless needed for any other offence. The appeal is allowed accordingly.

15. We quantify the fees to be paid to the advocate appointed for the appellant at Rs. 1500/- for this appeal

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]